IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. _____

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Supreme Court of the State of Wisconsin was without right or justification under principles of law and jurisprudence enunciated to the following effect: that it has heretofore established by a long line of decisions that in respect to questions in jury cases like, or identical in their circumstances with this case, the answers of the jury are final if supported by credible evidence and not subject to alteration by any trial judge or even the Supreme Court of the State of Wisconsin.

Among these decisions are the following:

"If the evidence is conflicting, or if the inferences to be drawn from the credible evidence are doubtful

and uncertain, and there is any credible evidence which under any reasonable view will support or admit of any contention of any party, then the rule that the proper inference to be drawn therefrom is a question for the jury should be firmly adhered to, and the Court should not assume to answer such question either upon a motion for non-suit or direction of verdict, *or by substituting* another answer after the verdict is returned."

Trautmann v. *Chas. Schefft & Son Co.*, 201 Wis. 113, 115, 116.

This rule has been confirmed in the following cases:

Jensen v. *Jensen*, 228 Wis. 77, 80.
Borg v. *Downing*, 221 Wis. 463.
Steubing v. *L. G. Arnold, Inc.*, 210 Wis. 513, 515.
Gumm v. *Koepke*, 227 Wis. 635, 637.
Sichling v. *Nash Motors Co.*, 207 Wis. 16, 21.
Harter v. *Dickman*, 209 Wis. 283, 287.
Svenson v. *Vondrak*, 200 Wis. 312, 317.
Walter v. *Four Wheel Drive Auto Co.*, 213 Wis. 559, 562, 563.
Riesehl v. *Wisconsin-Michigan Power Co.*, 236 Wis. 116, 294 N. W. 521, 523.
Millard v. *North River Ins. Co.*, 201 Wis. 69, 71.
Burton v. *Brown*, 219 Wis. 523-524.

In the Riesehl case above cited said Supreme Court of Wisconsin said, quoting *Borg* v. *Downing*, 221 Wis. 463, 465:

"If there is any credible evidence, which under any reasonable view will support or admit of an inference for or against the claim or contention of any party, then what is the proper inference to be drawn therefrom is for the jury, and the court should not assume to answer such questions by substituting another answer after the verdict is returned."

In the second last case cited the rule theretofore made

inviolable as to trial courts was extended to the Wisconsin Supreme Court itself, where it was said at the last mentioned page:

> "In the case at bar, if there was any credible evidence which under any reasonable view fairly admitted of any inference that supported or admitted of the jury's finding that the hazard was not increased, then it was necessary to submit that issue to the jury, and neither the trial court, *nor this court* (namely, the Supreme Court of Wisconsin), *could properly substitute an affirmative answer for the jury's answer to that question.*" (The parenthetical phrase is ours.)

In this case we maintain that not only was there credible evidence to support the answers of the jury to every question submitted to them in the special verdict of twelve questions, but that there was, when rightly viewed, no evidence whatsoever to support any other conclusion. Careful reading of the stipulation between the parties in open court leaves no room whatsoever for any other view (C. 36-39, bottom pp. 37-40).

All of the relevant and material evidence in the record, introduced by plaintiff, every bit of it highly credible, supports the jury's findings; *and there is absolutely no evidence to the contrary.* There is *an attempt in defendants' pleadings to substitute for the issue of responsibility for the "bombings" mentioned in the libel, questions of divergence of view respecting the ethics of labor strikes, lockouts and other irrelevant matter.*

The opinion of the Supreme Court of Wisconsin construes away all defamatory features and significance of a virulent libel of plaintiff by recourse to and substitution of *irrelevent and immaterial facts said to have happened in Sheboygan Falls 55 or more miles away at another time where no bombing ever occurred as far as the record shows, no burglary or larceny of government property was ever committed, no violation of the statutes of the state pro-*

hibiting the illegal and improper possession, use or participation in explosion of dynamite, took place, no building was wrecked, no human life was lost and no situation similar in any respect was presented to the real setting of the publications complained of in this case.

At the trial no one doubted the power or propriety of the trial judge to say whether or not the libelous language published by the defendants was susceptible of the meaning attributed to it by the plaintiff, but that it was for the jury to say whether such was the true meaning of the language used. It is now said in the opinion of the Supreme Court of Wisconsin on the appeal herein that the trial court on motions after verdict has the power of *determining whether language alleged to be libelous is susceptible of the meaning attributed to it in the complaint.* Such is not the law of Wisconsin. The trial judge here was not denied the right to determine whether or not the language of the alleged libel was susceptible of the meaning attributed to it by the plaintiff. *The fact is the trial judge exercised this power.* In this respect he functioned fully. In doing so he granted *respondents' request to submit the issues of fact to the jury on a special verdict. They themselves asked for inclusion in such special verdict the very questions, 1 and 2, now under consideration.* The trial judge accepted their suggestions and submitted them in the form shown in questions 1 and 2 of the special verdict.

Moreover, the trial judge charged the jury concerning their duty to find for or against either party as they found the facts to be concerning *the issues presented by those two questions.*

The trial court told the jury they might answer both of these questions "yes," and if they should not find the proofs satisfactory to them, they must answer these questions "no." The jury strictly, religiously followed the instructions of the court and brought in their answers in

perfect harmony with all the proofs at the trial. *So the judge functioned completely in his right to determine whether or not the libelous language complained of was susceptible of the interpretation placed upon it by the plaintiff.* Having done so and there being abundant credible evidence in support of such findings of the jury, indeed no relevant, material evidence to the contrary, neither the trial court nor the Supreme Court of Wisconsin may now *arbitrarily change* the answers of the jury to such questions without violation of a firmly established rule of law in this state that in such a situation both courts are limited to the very narrow inquiry of whether or not there is any credible evidence to sustain the jury's findings. Thus we say that in a very true sense the answers to Questions 1 and 2 of the special verdict became verities in this case and now no Judge, not even the Supreme Court of the State of Wisconsin, can lawfully alter, strike or ignore such answers of the jury. Such is the hitherto unbroken law of the State of Wisconsin.

Though there is no decision of the Supreme Court of the State of Wisconsin on the point, in sister states the law is firmly settled that *one may not request a ruling* or order, such as the submission of a proposed question to be embodied in a special verdict and *afterward assign the court's action in complying with such request as a ground for reversing or setting aside* the verdict. In Indiana the highest court said:

> "The party who secures the submission of interrogatories may not withdraw them after the return of the general verdict. When approved by the Court, and properly submitted to the jury, they become a matter of interest to both parties; and neither can deprive the other of a right to have answers returned by the jury."
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> *Duestenberg* v. *State ex rel.*, 116 Ind. 144, 17 N. E. 624.

So also in Missouri. It was there said:

"Defendant's counsel further objects to the character of the verdict and finding of the jury. He insists that 'the evidence gave no values upon which the jury could base its special verdict and findings.' If so, why did the defendant request the court to submit special issues to the jury? Surely it cannot be permitted to present special issues to a jury and then object for the reason that there was no evidence upon which the jury could make any such findings.

"The appellant cannot be heard to allege that as error of the trial Court which it invited the Court to commit."

Gale v. *The State Ins. Co.*, 33 Mo. App. 664, 677.

A like rule prevails in the State of Nebraska:

"Where a party has requested the submission of special questions to the jury to be answered by them, and the answers returned are sustained by the evidence, he cannot be heard to complain of such answers."

Bloomfield v. *Pinn*, 84 Neb. 472, 121 N. W. 716, 718.

And so also in West Virginia. The highest state court has said:

"Even if the Court would have been justified in refusing them, (requested questions for a special verdict) it does not follow that after the Court had once exercised its discretion by submitting the question it could retrace its steps and withdraw them."

McKelvey v. *Chesapeake & Ohio Railroad Co.*, 35 W. Va. 500, 14 S. E. 261, 263.

The same is the rule not in the form of a judicial decision, but as statutory law in Wisconsin. It is as follows:

"In any trial before the court with or without a jury or before a referee * * * any party *who expressly requests any finding of fact, conclusion of law, instruction to the jury or ruling or order shall not be heard*

> *to question its correctness on appeal.* This shall not, however, limit the power of the Supreme Court to Section 251.09 statutes."
>
> Section 270.39 Wisconsin Statutes.

This statutory rule is not modified by Section 251.09 which applies only to cases where it shall appear to this court from the record,

> "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."
>
> Section 251.09 Wisconsin Statutes.

We respectfully submit these exceptions do not belong in either of the classes mentioned.

The foregoing propositions should rule the issue in this case as to the right of petitioner to have the answers of the jury to the first two questions retained as returned by the jury.

Respondents contended at the hearing of the motions after verdict that Questions 1 and 2 of the special verdict conflicted and that an affirmative answer to the first would necessarily eliminate the second. This suggestion is without merit. Petitioner at that hearing suggested the two questions be merged into one as they supplement each other; and when, as here, the jury answered them both in the same way, taken together they constitute strictly only one finding of ultimate fact in the case, namely, that the libel here charged was not only susceptible of being interpreted, but it actually was understood by persons of average intelligence and comprehension to accuse petitioner of the crimes of malicious destruction of life and property. In Wisconsin the same punishment is prescribed for guilty principals and guilty accessories before the fact. (See Section 340.74 Wisconsin Statutes.)

In addition, it is clear respondents have in another way

estopped themselves from now having the answer to Question No. 1 and to Question No. 2 by virtue of the fact that in their motions after verdict they made no motion to strike Question No. 1, but instead moved to change the answer thereto from "yes" to "no." It is the settled law of this state that the effect of this motion of respondents is to confirm the question as properly submitted to the jury and to ratify the jury's answer thereto. This point arose some years ago where respondents moved similarly to change the answer of the jury, but said court without dissent, said:

> "So far as respondent is concerned, the seventh question was properly submitted under proper instructions and properly stands in the record, *and full effect must be given to the answer.* After the verdict was rendered respondent's counsel did not move to strike out the seventh question and answer, but his motion was to change the answer, *which must have been made upon the assumption that the seventh question was properly submitted and under proper instructions.*"
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> *Cook Land Construction & Producing Co.* v. *Oconto Company,* 134 Wis. 426, 430.

Such is the only decision of this court on the point here presented. We submit it precludes defendants from moving to change the answer as they did, after the verdict had been returned.

On the issue of exercise by the trial judge of his power to determine whether the libel complained of is susceptible of the interpretation placed upon it in the complaint, as well as his view there was no incompatibility between the first question and the second question of the special verdict, the trial judge's charge to the jury is illuminating. Here it is:

> "You will not answer Questions 1 and 2 'yes,' unless you are satisfied to a reasonable certainty that the article complained of would be understood by a

person of average intelligence and comprehension as accusing the plaintiff of actual guilt of the crime of malicious destruction of property or as accessory before the fact of the crime of malicious destruction of property. If you are not so satisfied, you will answer them 'no'." (C. 4, Bottom p. 5.)

Specifically in their motions and argument after verdict respondents criticized this instruction as a departure from the directions of the trial judge to the jury.

In respect of the matter just mentioned, namely, the action of said Supreme Court of Wisconsin in affirming the erroneous decision of the trial court in changing the answers of the jury to the first two questions of the special verdict from "yes" to "no," was not only grievous error, but also was and is a denial to the petitioner (who is a natural born citizen of the United States and subject to its jurisdiction) (C. 71, Bottom p. 72) of that equal protection of the law guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States.

This plea for equal protection of the law as secured to petitioner by the first section of the Fourteenth Amendment to the Constitution of the United States was squarely presented to the Supreme Court of the State of Wisconsin for consideration and determination. That tribunal did consider and determine it, but their decision was against the claim of reversal for a change in their prior decision including the ground that it had so considered said claim but "found no basis for its support in the record."

II.

EQUALLY OR EVEN MORE DESTRUCTIVE OF PETITIONER'S RIGHTS BY THE SUPREME COURT OF WISCONSIN IS THAT IT FOLLOWED THE LEAD OF THE TRIAL COURT IN REFUSING TO GRANT JUDGMENT AS MOVED BY PLAINTIFF IN HIS FAVOR ON THE ANSWERS OF THE JURY TO QUESTIONS 3 TO 12, INCLUSIVE, OF THE SPECIAL VERDICT. THESE ANSWERS OF THE JURY TO SUCH QUESTIONS WERE NOT DISTURBED BY EITHER THE TRIAL COURT, OR THE SUPREME COURT OF WISCONSIN.

This portion of the verdict thus stands in the record undisturbed and unimpaired *as verities in the case.* Each one is indubitably sustained by credible evidence and under the rule mentioned in Division I of this brief, cannot now be disturbed or disregarded. What has happened is that in the trial court on *motions after verdict* and in the Supreme Court of Wisconsin on appeal from the judgment herein adverse to petitioner the answers of the jury to Questions 3 to 12, both inclusive, are in each case not squarely met, but are sought to be circumvented by inappropriate, irrelevant invocation of the inapplicable doctrine of "conditional privilege."

We shall not here and now multiply words or cases or authorities on this subject. We simply contend the doctrine of conditional privilege has no application whatsoever to this case. This is so for two independent, separate, distinct reasons, *either of which alone* is sufficient to authorize judgment for petitioner on this portion of the jury's verdict:

(a) There is not in the record herein a scintilla of evidence of any wrongful, censurable or improper conduct

on the part of petitioner in respect of the bombings mentioned in the libelous charge. The Supreme Court of Wisconsin has repeatedly and without exception heretofore held that in these circumstances there is no foundation, license or excuse for invoking the doctrine of conditional privilege as it applies only to cases where the petitioner has committed some fault in connection with the libelous transaction and with a foundation of fact to go on, the courts have permitted the printing of the facts with such comment as may be proper or allowable. But this is not an unbridled license for falsehood as in the present case. Petitioner is absolutely and wholly free from fault in connection with the "bombings" in this action and this is why when the time came for establishing some connection between Rutkowski and Chovonec on the one hand, and on the other petitioner herein, respondents had no evidence because there was no such connection. In other words, *there must be a basis of fact in petitioner's conduct relative to the libel* to permit the doctrine of conditional privilege in the case of a member of the press when hailed into court for libel.

The rule is aptly stated in *Leuch* v. *Berger*, 161 Wis. 564, 573, in language so plain, no excuse can be made for not understanding and enforcing the doctrine:

> "This court has no disposition to restrain the legitimate freedom of the press. That freedom *does not comprehend the publication of untruthful statements about a private person or public officer*, where such statements charge *crime or tend to make the individual or officer attacked an object of public hatred, ridicule, or contempt.* In the hurry with which news is gathered and put into print, it is often difficult to verify its accuracy. But where it is of the character stated, *the publisher is bound at his peril to know whether it is true or false before it is given out to the world as true.*" (Italics ours.)

There must *be a basis of fact* to sustain any publication

put forth under claim of the right to print, conditional privilege or any other similar pretext. Here there is no such basis or any scintilla of evidence of such a claim.

Walters v. *Sentinel Co.*, 168 Wis. 196.

(b) The second, separate, distinct reason why there is and cannot be conditional privilege in this case is that the jury found all the respondents *guilty of express malice* toward petitioner *in the answers made to Questions 3 to 12*, both inclusive, *and these answers still stand.* This alone destroys any claim any of respondents may have to conditional privilege. This rule is tersely stated by the Supreme Court of Wisconsin as follows:

> "If express malice be found it destroys the conditional privilege that would otherwise obtain. *Rude* v. *Nass*, 79 Wis. 321, 328; *Joseph* v. *Baars*, 142 Wis. 390; *Arnold* v. *Ingram*, 151 Wis. 438, 458. *Williams* v. *Hicks Printing Co.*, 159 Wis. 90."
>
> *Gerlach* v. *Gruett*, 175 Wis. 354, 359.

The only decision relied on by respondents and twice cited by the trial court in its decision on the motions after verdict is *Grell* v. *Hoard*, 206 Wis. 187 (C. 52, Bottom p. 53). Petitioner respectfully submits the Grell decision is not in point in support of the judgment in the instant case:

(a) The Grell decision was made in an appeal from an *order* of the Circuit Court of Jefferson County *overruling a demurrer* to one of the causes of action of the complaint. *There was no trial*, and, unlike the case at bar, *no verdict of the jury sustaining the cause of action demurred to.* In this state of the record the Supreme Court of Wisconsin said:

> "If the demurrer were overruled, the case tried and a verdict of the jury returned in favor of plaintiff we would then have the question before us whether the article in question charges the plaintiff with recklessly causing the death of travelers.

> Interpreted *as the pleader interpreted the article,* it was not libelous. Charging a public officer with being inefficient and incapable of the performance of the duties of his office *when the charge has some fair and reasonable basis in fact is not libelous."* (Italics ours.)

In the instant case there is no fair or reasonable basis of fact, indeed, *there is no such basis at all.*

(b) Secondly, as interpreted by the pleader, the article in the Grell case was held not libelous for the reason that so interpreted it merely charged the plaintiff with being inefficient and incapable. The condemnation or lack of regard for human life and safety was held not to apply to the plaintiff but to the type of ditch "which as highway engineer he had constructed."

So the Supreme Court of Wisconsin did not consider the aspect of the charge interpreted as involving the safety of travelers. Thus there was an alternative construction of the libel that made some sense in view of the blunder of plaintiff's counsel. *Here there is no such alternative interpretation whatsoever.* Here no fact in the record implicates Hoan *in the slightest degree with any misconduct within the terms of the libel.* Lacking such a basis for a journalistic criticism *there can be no conditional privilege and no right to print anything that is not true without incurring the penalties provided by the law of libel.* So the Grell case is really an authority on the side of petitioner.

(c) Thirdly, the Supreme Court of Wisconsin frankly stated that its decision in *Grell* v. *Hoard* presented *"a close one and crowds the line between privileged and unprivileged publications."* It is not therefore a precedent to be indiscriminately followed.

(d) Finally, there is no sanction found in the Grell case that such a libel as is here presented is privileged. On the contrary, *it holds exactly the opposite.* It limits the field of conditional privilege in criticism of a citizen, even a public officer, *to cases where there exists a basis of fact to*

justify criticism which may be indulged in so long as it does not charge what is false. Without such a basis of fact of any misconduct of petitioner as charged in the libel, least of all that he participated in the most remote way in the "bombings" shown by the evidence, there is no foundation for the defense of conditional privilege. Privilege must have some basis of fact to go on. Suspicion, falsehood or faultfinding without any basis at all, as here, does not license the editorial pen. Falsehood, even falsehood so gross it may appear incredible to some, will not suffice. There must exist some basis of undoubted fact of the truth of the libel charged. Here there is nothing of the sort—just naked denunciation and blame for responsibility for monstrous crimes; for the language here amounts to just this plain charge. Blame for the bombings means participation in some way in the six crimes plainly defined by our statutes on the use of dynamite, including burglary and larceny plus the odious charge of blackmail.

Here again petitioner invokes the protection as a natural born citizen of the United States and subject to the jurisdiction thereof (C. 71, Bottom p. 72), of the first section of the Fourteenth Amendment to the Constitution of the United States of equal protection of the law in this case equal with all other citizens in like status and circumstances. In every instance the verdict of the jury in his favor, including the portion embraced in the answers to Questions 3 to 12, both inclusive, was and is invulnerable to just attack by respondents and have been so held in other cases of libel without exception of any kind for so many years where like questions arose that the rights based on them are and should be unassailable.

III.

THE SUPEREME COURT OF WISCONSIN IN ITS OPINION STRESSES AND SETS FORTH AT LENGTH PORTIONS OF RESPONDENTS' ANSWER OSTENSIBLY CONTAINING MATTERS OF JUSTIFICATION AS CLAIMED, BUT WHICH RESPONDENTS LATER IN THE TRIAL COURT ABANDONED.

The Supreme Court of Wisconsin apparently based, in part at least, its decision on petitioner's appeal herein on the portion of respondents' answer setting up or attempting to set up a plea of justification. Petitioner submits in the first place that the pleas were not good because none of them was as broad as the libel, which is a requirement in all cases where justification is pleaded; next, these defenses were not in the affirmative, but in the subjunctive mood as grammarians would say, and therefore not valid pleas.

Pellardis v. *Journal Printing Co.*, 99 Wis. 156.

Another rule of law firmly imbedded in the jurisprudence of Wisconsin is that a

> "Defendant may not attribute some recondite meaning to the published article and proceed to justify on this basis. *Pfister* v. *Milwaukee Free Press*, 139 Wis. 627. The words used must be construed in the plain and popular sense in which they would naturally be understood. *Bradley* v. *Cramer*, 59 Wis. 309, 312."
>
> *Leuch* v. *Berger*, 161 Wis. 564, 571.

The precise language used in the Pfister case first above cited is as follows:

> "The defendants could not attribute some recondite meaning to the words used which readers of the article would not be apt to discover and then proceed to justify on the basis of such meaning being the true one. Neither is the meaning intended by the writer of an article important, unless such meaning is the

natural and obvious one and the meaning that would be conveyed to the readers of the article generally."

Pfister v. *Milwaukee Free Press Co.*, 139 Wis. 627, 651.

Further, respondents through their newspaper, the Milwaukee Journal, after the publication of the libelous matter in its issue of November 4, 1935, admitted its error in attributing fault to petitioner in connection with the bombings. In an article entitled "Out of a Terrible Week" respondents fixed responsibility for all bombings and blackmail tactics on Rutkowski and Chovonec and recanted the claim made in justification in respondents' answer, concluded as follows:

> "Yet there have been times, recently, when law and order have been challenged, not alone by crime, but by those who feel social and economic injustice. There has been a tendency to violence. *It had nothing at all to do with this affair, for this youth* (meaning Rutkowski), *was apparently of no organization or connections. His grudge was that of a warped mind which felt a grievance against society, especially the police.*" (The insertion of Rutkowski's name and the italics are ours (R. 1136, Plaintiff's Exhibit 21; C. 36-39, Bottom pp. 37-40).)

Most important of all is the circumstance that the *pretended defenses of justification were openly abandoned by respondents during the trial and no proof was made by them to connect petitioner with any of the misconduct imputed by the language of the libel of which he complains* (Suppl. Case 226; Bottom p. 400). This abandonment may have escaped the attention of the Supreme Court of Wisconsin. At that stage of the trial it was as plain to everyone who had attended the proceedings as it was to respondents themselves. The defense was not presented because there was no such defense. Petitioner was and is faultless of the offenses mentioned in the libel. Again we invoke the protection of the Fourteenth Amendment of

the United States Constitution, Section 1 in favor of petitioner, a natural born citizen of the United States (C. 71, Bottom p. 72), subject to the jurisdiction thereof of equal protection of the law.

This court has held the equal protection of the laws is a pledge of the protection of equal laws.

State of Missouri ex rel. Lloyd Gaines v. *S. W. Canada,* 305 U. S. 337, 83 L. ed. 208-216.

IV.

In the light of the departures of the Supreme Court of Wisconsin which sought to negative and wholly disregard long settled principles of law in this state applicable to actions of libel, there was not only grievous *injustice done to petitioner; there was also invasion of his right to equal protection of the law guaranteed* by Section 1 of the Fourteenth Amendment to the Constitution of the United States. Again we remind the court that petitioner is a natural born citizen of the United States and subject to the jurisdiction thereof; that he has asked the Supreme Court of Wisconsin to vindicate petitioner's rights herein. It has considered the issue but has denied relief.

Section 1 of Article XIV. of the Constitution of the United States is as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The federal question here presented is something more than violation of long settled precedents and procedure to

the prejudice of petitioner; it is virtually laying down one rule of law for him and precisely an opposite rule for others. The protection he seeks is a matter of substantive law, right and justice as precious, universal and supreme in its sway and more sacred than any other tenet in the entire range of our judicial system.

Respectfully submitted,

FRANCIS E. MCGOVERN,
Counsel for Petitioner.